VOON LEE SHAN

v.

SARAWAK PRESS SDN BHD & ANOR

HIGH COURT SABAH & SARAWAK, KUCHING
LAU BEE LAN JC
[SUIT NO: 22-11-2003-II]
10 OCTOBER 2003

CIVIL PROCEDURE: *Pleadings - Libel - Justification - Striking out defence - Specific charge by plaintiff - Failure to justify specific charge thereof - Whether defence to be struck out - Rules of High Court 1980, O. 18 r. 19(1)*

TORT: *Defamation - Libel - Plea of specific charge by plaintiff - Defence of justification - Whether to be limited to matters specifically complained of - Failure to allude to specific charge of plaintiff - Whether defence to be struck out - Rules of the High Court 1980, O. 18 r. 19(1)*

The defendants published an article in the Sarawak Tribune alleging that the plaintiff, a lawyer and a politician, was detained and charged in court for harbouring an illegal Indonesian immigrant ('the impugned article'). The plaintiff sued the defendants for libel, averring that the impugned article, by its natural and ordinary meaning, imputed that he was guilty of a crime and was unfit to be a practicing lawyer or a political leader. The defendants pleaded justification, arguing that the words complained of only meant that the plaintiff had been charged with an offence under s. 216 of the Penal Code, and that he was innocent until proven guilty. In the particulars of justification, however, the defendants reproduced, word for word, the criminal charges in question, which alleged that the plaintiff was harbouring one Hendrick Tan Boon Kai with the intention of preventing that person from being apprehended for allegedly committing murder. The plaintiff contended that the justification, as pleaded, did not seek to justify the specific imputations of his complaint, and was irrelevant to the sting of the libel, and in the circumstances applied to strike out the defence under O. 18 r. 19 Rules of the High Court 1980 ('RHC'). The facts also showed that the defendants were seeking to adduce mitigating evidence that they had offered an apology to the plaintiff, and that being so, questions arose before the learned Judicial Commissioner as to: (i) whether the plaintiff had complained of a specific charge; (ii) whether the particulars of justification must be limited to the said specified matters; (iii) whether the defendants could rely on partial justification under s. 8 of the Defamation Act 1957 ('the Act'); and (iv) whether the apology came within the ambit of s. 10(1) of the Act and was hence admissible.

Held:

[1] The plaintiff is entitled to plead a specific charge against the defendants upon the authority of *Bookbinder v. Tebbit* [1989] 1 All ER 1169. (p 436 d)

[1a] The plaintiff has pleaded a limited meaning of the words complained of *ie*, a specific charge of harbouring an illegal Indonesian immigrant and relied on their natural and ordinary meaning as the sting of the libel. Upon the objective test of the ordinary reasonable man, the court would agree that the words complained of, in the context of the impugned article, connote the meaning as pleaded by the plaintiff. It is thus incumbent on the defendants to justify the meaning of the specific allegation, otherwise the defence of justification will fail. (pp 436 c, d & 437 b)

[2] The defendants' justification of the meaning of the impugned words, namely their contention that the plaintiff was charged with harbouring a person with the intention of preventing him from being apprehended for allegedly committing an offence under s. 302 of the Penal Code, was unrelated and irrelevant to the sting of the libel and the meaning pleaded by the plaintiff. Such evidence is inadmissible and ought to be struck out. (p 438 e-f)

[3] By virtue of s. 8 of the Act, in an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges. In the present case, however, the plaintiff complained only of one specific charge and the defendants published only one charge ie of harbouring illegal immigrant, and as the plea of justification has not justified the precise imputation complained of, it follows that s. 8 of the Act is irrelevant and inapplicable. (p 439 a & d)

[4] Notwithstanding the absence of an explicit provision in s. 10(1) of the Act that a defendant can give notice of his intention to offer an apology by incorporating the apology in his defence, the defendants, by incorporating the apology in their statement of defence, have duly complied with the requirement of the section. Such an interpretation is tenable in the light of *Malayan Banking Bhd v. Lim Chee Leng & Anor* [1985] 1 MLJ 214. (pp 442 f & 443 b)

[5] The defendants' pleadings in respect of paras 5, 7(3) and 7(4) in so far as they relate to para 5 of the statement of defence ought to be struck out pursuant to O. 18 r. 19(1) of the RHC for being frivolous, an abuse of process of the court and for the tendency to embarrass or delay the fair trial of the action. This, however, does not apply to the whole of para 10 of the statement of defence for which there was a triable issue that ought to be determined at a full trial. (p 444 b & c)

[Partial order in terms of the application.]

Case(s) referred to:

Abdul Rahman Talib v. Seenivasagam & Anor [1966] 2 MLJ 66 ***(refd)***
Bandar Builders Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***
Bookbinder v. Tebbit [1989] 1 All ER 1169 ***(foll)***
Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(dist)***
Goode v. Journal Publishing Co [1907] 6 WLR 511 ***(refd)***
Guan Siew Tham & Ors v. Sarawak Press Ltd [1960-63] SCR 188 ***(refd)***
Khashoggi v. IPC Magazines Ltd & Anor [1986] 3 All ER 577 ***(refd)***
Koh Siak Po v. Sayang Plantation Bhd [2002] 1 CLJ 501 CA ***(dist)***
Lee Kuan Yew v. Devan Nair [1990] 2 CLJ 877; [1990] 3 CLJ (Rep) 685 HC ***(refd)***
Malayan Banking Bhd v. Lim Chee Leng & Anor [1985] 1 MLJ 214 ***(foll)***
Moore v. News of the World Ltd & Anor [1972] 1 All ER 915 ***(foll)***
Polly Peck (Holdings) PLC & Ors v. Trogmorton Publications Ltd & Anor [1972] 3 All ER 497 ***(refd)***
Scott v. Sampson [1882] 8 QBD 491 ***(foll)***
Speidel v. Plato Films Ltd [1961] 1 All ER 876 ***(foll)***
Tan Sri Dato' Paduka (Dr) Ting Pek Khing v. Hii Chan Pee [2000] 6 CLJ 207 HC ***(refd)***
Templeton v. Jones [1984] 1 NZLR 448 ***(refd)***
Tun Datuk Patinggi Hj Abdul Rahman Ya'kub v. Bre Sdn Bhd & Ors ***(refd)***
Quah Swee Khoon v. Sime Darby Bhd [2001] 1 CLJ 9 CA ***(dist)***

Legislation referred to:

Defamation Act 1957, ss. 8, 10(1), (2)
Penal Code, ss. 216, 302
Rules of the High Court 1980, O. 18 r. 19(1)(b), (c), (d), O. 92 r. 4

Defamation Act 1952 [UK], s. 5
Libel Act 1843 [UK], s. 1

Other source(s) referred to:

Gatley on Libel and Slander, 9th edn, para 31.2, pp 698, 789-790
Halsbury's Laws of England, 4th edn, vol 37, para 430

For the plaintiff - Chong Siew Chiang; M/s Chong Brothers
For the defendants - Sunny Si; M/s Si & Assoc

Reported by WA Sharif

JUDGMENT

Lau Bee Lan JC:

Background

Vide a summons in chambers dated 22 April 2003 (encl. 10) the plaintiff applied essentially for:

(1) the defence of justification and the particulars in para. 5, para. 7(4) and part of the para. 7(3) in so far as it related to para. 5 and the whole of para. 10 of the defence be struck out; and

(2) the time for the filing and service of reply (if any) be extended to 14 days after the disposal of the application (hereinafter referred to as "the application").

The application of the plaintiff is made pursuant to O. 18 r. 19(1)(b), (c) and (d) and O. 92 r. 4 of the Rules of the High Court 1980 ("the RHC") on the following grounds:

(a) it tends to embarrass, prejudice and delay the fair trial of the action;

(b) it is otherwise an abuse of the process of the court, and/or it is oppressive or frivolous; or

(c) it is irrelevant to the specific charge or the defamatory meaning alleged or complained of by the plaintiff in his statement of claim.

The application is supported by the affidavit of the plaintiff, Voon Lee Shan affirmed on 21 April 2003 (encl. 10) and opposed by the affidavit in reply of Ee Swee Teck affirmed on 5 June 2003 (encl. 12).

It is not disputed that the plaintiff is currently an advocate in the High Court in Sabah and Sarawak, treasurer in the Sarawak State Committee of Democratic Action Party (DAP) and prior to that he was the Education and Political Bureau Chief in the Sarawak State Committee of the DAP and was a former Chief Inspector of Police in the Royal Malaysia Police Force (Polis Diraja Malaysia); whilst the 1st defendant is the printer and publisher and/or proprietor of the "Sarawak Tribune" and the 2nd defendant is its editor.

Further, it to be noted that both parties have agreed that no reliance would be placed on s. 10(2) of the Defamation Act 1957 ("the Defamation Act").

To comprehend and appreciate fully the matter to be adjudicated, it would be necessary that the pertinent extract of the article published in the newspaper, "Sarawak Tribune" on 24 December 2002 ("the impugned article"), the relevant portions in the statement of claim and the statement of defence be quoted in toto as follows.

The extract of the impugned article at p. 2 reads:

The headline of the article

Lawyer charged with harbouring illegal immigrant

Paragraph 1 of the article

The Education and Political Bureau Chief of Democratic Action Party (DAP), who was **charged** in the Magistrate's Court here yesterday with **allegedly harbouring illegal immigrant** was allowed bail of RM3,000.00 with one surety.

Paragraph 2 of the article

The accused, Voon Lee Shan, who is also a lawyer by profession, was charged ... with **allegedly harbouring illegal Indonesian nationals**.

Paragraph 8 of the article

But the police, who realized the Indonesian national was staying here without any proper travel documents, immediately apprehended him. Investigations revealed that the Indonesian national was staying in the State illegally. Voon was also detained for alleged involvement in **harbouring an illegal foreigner**. (see paragraph 2 of the Statement of Claim) (emphasis added)

The Plaintiff contends that the words complained of were defamatory of the Plaintiff and in their natural and ordinary meaning mean:

(a) the Plaintiff has committed or is guilty of a criminal offence of **harbouring illegal immigrant and illegal Indonesian nationals** rendering him unfit to be a practising lawyer and a political leader.

(b) the Plaintiff has committed or is guilty of a serious crime of **harbouring illegal immigrant and illegal Indonesian nationals** and as a result he was detained by the police.

(c) the Plaintiff, a practising lawyer and a political leader, being concerned in **harbouring illegal Indonesian national and illegal foreigner** and therefore detained by the police for such involvement, is an unscrupulous and irresponsible person and/or is a person without any sense of justice or integrity.

(d) the Plaintiff's conduct in **harbouring illegal Indonesian nationals and/ or illegal immigrant** is disgraceful, immoral and/or unprofessional. (see paragraph 4 of the Statement of Claim) (emphasis added)

This was disputed by the defendants who allege that the words complained of in their actual and ordinary meaning bore the following meaning which were true:

(a) the plaintiff was charged with the crime of harbouring under s. 216 of the Penal Code; and

(b) the plaintiff was charged as stated above and under the Laws of Malaysia he is innocent until proven guilty, (see paras. 5.1 and 5.2 of the statement of defence)

Further, in respect of the two paragraphs above, the particulars of justification are:

(a) On 18 November 2002 the plaintiff was charged at the Magistrates' Court, Kota Samarahan under Criminal Case number CCR-96-16-2002 as follows:

> That you, on or about the 11th day of July, 2000, at about 11.15 a.m., at the vicinity of Pejabat Daerah Kota Samarahan, in Samarahan District, in the State of Sarawak, one HENRICK TAN BOON KAI (M) was ordered to be apprehended for an offence punishable under Section 302 of the Penal Code by K/Insp. Anoi bt. Kian a public servant, harboured or concealed the said Hendrick Tan Boon Kai with the intention of preventing him from being apprehended, and that you have thereby committed an offence punishable under Section 216 of the Penal Code.

(b) On 19 November 2002 at the said Magistrates' Court the aforesaid charge was amended to read:

> That you, on the 11th day of July 2000, at about 11.15 a.m., at the vicinity of Pejabat Daerah Kota Samarahan, in Samarahan District, in the State of Sarawak, one HENRICK TAN BOON KAI (M) was ordered to be apprehended for an offence punishable under Section 302 of the Penal Code by C/Insp. Anoi bt. Kian a public servant in the exercise of her lawful powers as such public servant, and that you knowing of the said Order for apprehension, harboured the said HENDRICK TAN BOON KAI with the intention of preventing him from being apprehended, and that you have thereby committed an offence punishable under Section 216 of the Penal Code.

(c) On 23 December 2002 the said case was transferred from the Magistrates' Court, Kota Samarahan to the Magistrates' Court, Kuching for mention.

(d) At all material times the plaintiff maintained his plea of not guilty to the aforesaid charge.

Court's Findings And Evaluation

The court has considered the helpful submissions of the learned counsel for the plaintiff and the defendants, Mr. Chong Siew Chiang and Mr. Sunny Si respectively, the pleadings and the affidavit in support of and affidavit in opposition to the application. The findings and evaluation of the court are set out as hereinbelow.

(a) Whether The Plaintiff Complained Of A Specific Charge

In the instant case, looking at the impugned article *vis-a-vis* the manner the plaintiff has opted to plead the charge complained against the defendants in respect of the publication, it cannot be denied that the plaintiff has pleaded a limited meaning of the words complained of ie, a specific charge of harbouring an illegal Indonesian immigrant and relies on their natural and ordinary meaning which is the sting of the libel. Based on the objective test of an ordinary reasonable man, I agree with the plaintiff that the words complained of in the context of the impugned article would connote the meaning and words as pleaded by him. The plaintiff is entitled to plead a specific charge premised on the authority of *Bookbinder v. Tebbit* [1989] 1 All ER 1169 cited by the learned counsel for the plaintiff in support.

In *Bookbinder v. Tebbit (supra)*, the plaintiff who was the leader of the country council, issued a writ alleging, *inter alia*, that the natural and ordinary meaning of the words complained of was that the plaintiff had acted irresponsibly in causing large-scale squandering of public funds. The defendant by his defence pleaded, *inter alia*, justification relying on (i) the specific issue of the overprinting and (ii) other occasions of alleged squandering of public money by the council under the plaintiff's leadership. *The plaintiff subsequently amended his statement of claim* by withdrawing the general charge of squandering public funds and *substituting a particular charge of squandering RM50,000 on the overprinting and then applied to have the defence of justification based on the general charge of squandering public funds struck out.* The judge dismissed the application and *the plaintiff appealed to the Court of Appeal which was allowed.* At p. 1174, Ralph Gibson LJ said – "Even where a defendant has published two distinct libels about a plaintiff the law permits the plaintiff to complain of one only, and to have the issue decided, and the law does not permit the defendant to justify the one of which complaint is made by proving the truth of the other. Nor does the law permit a defendant to lead evidence of particular acts of misconduct on the part of the plaintiff in mitigation of damages where the defendant has failed to justify the libel

complained of (see *Speidel v. Plato Films Ltd* [1961] 1 All ER 876, [1961] AC 1090) but the two libels must be distinctly severable into distinct parts and, if they are not, the plaintiff cannot pick and choose between them. (emphasis added)

It is incumbent on the defendants based on the authorities as submitted by the learned counsel for the plaintiff to justify the meaning of the specific allegation, otherwise the defendants would fail to establish the defence of justification. The legal proposition regarding this point has been established since time immemorial in 1882 in the unchallenged authority of *Scott v. Sampson* [1882] 8 QBD 491. In this case, the plaintiff, a dramatic critic for the "Daily Telegraph" sued the defendant who ran a weekly paper "The Reference" for libel in respect of the following charge: "Scott has systematically abused his position as a dramatic critic so as to extort money. He even threatened Admiral Glyn. He said he would publish some unpleasant facts about Miss Neilson unless he were paid £500: and Admiral Glyn paid him £500 to keep it out."

The defendant pleaded justification but failed because the court rejected evidence which related to particular instances of misconduct ie, for the purpose of abusing an actor he disliked personally as being inadmissible. Of pertinence is the dictum of Cave J at pp. 504 and 505 in *Scott v. Sampson (supra)* to the following effect: "As to ... evidence of facts and circumstances tending to show the disposition of the plaintiff, both principle and authority seem equally against its admission. At the most it tends to prove not that the plaintiff has not, but that he ought not to have, a good reputation, and to admit evidence of this kind is in effect ... to throw upon the plaintiff the difficulty of showing an uniform propriety of conduct during his whole life. It would give rise to interminable issues which would have but a very remote bearing on the question in dispute, which is to what extent the reputation which he actually possesses has been damaged by the defamatory matter complained of. Among all the cases which have been reviewed there is not one which can be cited in support of the admissibility of this evidence. ...

Scott v. Sampson (supra) till to date has been held to be good law by the House of Lords in the case of *Plato Films Ltd & Ors v. Speidel* [1961] 1 All ER 876 (per Lord Denning at p. 886). Further, in the case of *Spiedel (supra)*, the rationale against the admission of such evidence, in my view, is apparent from the dictum of Lord Guest at p. 895 when his Lordship said – "If allegations of specific instances of misconduct were allowed to be proved in evidence in mitigation of damages, it would open the door to issues which were truly collateral and which had but an indirect bearing on the main question in the case. *It would inevitably prolong the trial and tend to confuse the minds of the jury by distracting their attention from the main issue. The result might*

be that a trial in which the truth or falsity of one allegation was being investigated might degenerate into trials of the truth or falsity of a dozen other allegations whether or not relevant to the subject-matter of the libel, introduced by the defendants for the purpose of mitigating damages. (emphasis added).

Further, reverting to the facts of the case of *Bookbinder v. Tebbit (supra),* it was held that once the plaintiff withdrew the general charge of squandering public funds the wider meaning was not a meaning which a jury could properly apply to the words used by the defendant and *accordingly the defamatory charge in the words used was limited to the specific issue of the overprinting.* It followed that the appeal would be allowed and *the defence of justification based on the general charge of squandering public funds would be struck out.* (see headnote at p. 1169)

The legal principle that the particulars of justification must be limited to those matters of which the plaintiff had complained is echoed and applied in *Templeton v. Jones* [1984] 1 NZLR 448, *Tan Sri Dato' Paduka (Dr) Ting Pek Khing v. Hii Chan Pee* [2000] 6 CLJ 207 at p. 217 and *Tun Datuk Patinggi Hj Abdul Rahman Ya'kub v. Bre Sdn Bhd & Ors* [1996] 1 MLJ 393 at p. 406.

I find that the defendants seek to justify the meaning of the impugned words unrelated and irrelevant to the sting of the libel and the meaning pleaded by the plaintiff by contending the plaintiff was charged with general harbouring or harbouring a person with intention of preventing him from being apprehended for allegedly committing an offence under s. 302 of the Penal Code. Thus premised on the authorities cited hereinbefore, I agree with the learned counsel for the plaintiff that such evidence is inadmissible and ought to be struck out.

(b) Whether The Defendants Can Rely On Partial Justification Under s. 8 Of The Defamation Act And Must It Be Specifically Pleaded

The defendants seek to rely on s. 8 of the Defamation Act and in support of their contention referred to the cases of *Abdul Rahman Talib v. Seenivasagam & Anor* [1966] 2 MLJ 66, *Guan Siew Tham and Others v. Sarawak Press Ltd* [1960-63] SCR 188, *Polly Peck (Holdings) PLC and Others v. Trelford and Others* [1986] QB 1000, *S & K Holdings Ltd and Others v. Trogmorton Publications Ltd and Another* [1972] 3 All ER 497, *Khashoggi v. IPC Magazines Ltd and Another* [1986] 3 All ER 577 and *Lee Kuan Yew v. Devan Nair* [1990] 2 CLJ 877; [1990] 3 CLJ (Rep) 685. The plaintiff holds a contrary view.

Section 8 of the Defamation Act relates to the defence of partial defamation. By virtue of this provision, in an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges.

Reverting to the authorities cited hitherto, by way of illustration in *Abdul Rahman Talib (supra)*, the defendants had published two different charges against the plaintiff who likewise complained of two charges ie, that the plaintiff was corrupt in receiving sums of money and receiving favours. Although the defendant could prove the latter charge and not the former, but since the words making the former allegation do not materially injure the plaintiff's reputation having regard to the truth of the latter charge, the defendant's plea of justification under s. 8 of the Defamation Act succeeded. However in the present case, the plaintiff complained only of one specific and distinct charge and the defendants published only one charge ie, of harbouring illegal immigrant and as the plea of justification of the defendants has not justified the precise imputation complained by the plaintiff, it follows that s. 8 of the Defamation Act is not relevant and is inapplicable.

The cases of *Polly Peck (Holdings) PLC*, *S and K Holdings*, *Khashoggi* and *Lee Kuan Yew (supra)*, are distinguishable in that where the publication contained several defamatory allegations which are not severable and the sting lay in the totality of the allegations, it is not open to the plaintiff to select the defamatory statements of which he complained but must take the whole publication as it is. Again, the facts in the instant case are different and therefore these cases are irrelevant.

Next, the plaintiff has submitted that following *Moore v. News of the World Ltd & Anor* [1972] 1 All ER 915, the defendants ought to plead s. 8 of the Defamation Act if they seek to rely on it. On the other hand, the defendants contend that the practice of the court is to consider and deal with the legal result of pleaded facts even though the particular legal result is not pleaded. I do agree with the legal proposition submitted by the defendants based on the authorities cited. (see *Quah Swee Khoon v. Sime Darby Bhd* [2000] 2 MLJ 600, *Koh Siak Po v. Sayang Plantation Bhd* [2002] 1 CLJ 501, *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283).

Be that as it may, it is to be noted that the facts of the present case are different as it is a defamation action dealing with a statutory defence of partial justification under s. 8 of the Defamation Act. As stated in *Moore*'s case, the defendants would have to plead s. 5 of the Defamation Act 1952 (UK) (equivalent to s. 8 of the Defamation Act) if they wish to rely on it even if they are relying on it in the alternative.

Hence, I am of the opinion that it is material for the defendants to plead s. 8 of the Defamation Act specifically.

The next argument of the defendants is they have pleaded in the alternative in that if the court is of the view that the pleadings are insufficient, they seek leave to amend under O. 18 r. 19(1) of the RHC. I note that Lord Denning MR at p. 919 para e of *Moore*'s case (though obiter) stated, "I realise that in the course of the case, as the evidence proceeds, the defendant may realise that he cannot prove every jot or title of the libel. If the defendant then wishes to rely on s. 5, no doubt the judge will usually allow him to amend. At any rate it is for the defendant to raise the point. He did not do so here."

In *Halsbury's Laws of England*, 4th edn. vol. 37 at para 430 (cited by the defendants), it is stated, "In exercising its powers to strike out pleadings the court will allow a reasonable latitude subject to the overriding rule that every party is entitled *ex debito justitiae* to have his opponent's case presented in an intelligible form, so that he may not be embarrassed in meeting it. Indeed, the rules of court themselves expressly provide that the pleading or indorsement on the writ, or anything in the pleading or indorsement, instead of being struck out, may be amended. Thus, the court's coercive power to strike out pleadings is mitigated by its curative power to allow amendments, and in exercising its wide discretionary powers will generally give leave to amend a defective pleading where there is reason to suppose that the case can be improved or saved by a legitimate amendment". (emphasis added)

Having regard to the principle that "the court will generally give leave to amend a defective pleading where there is reason to suppose that the case can be improved or saved by a legitimate amendment", can the court in the circumstances of the present case exercise its discretion to grant the amendment?

I am of the view that it is inappropriate and it would be illogical for the court to exercise its power to grant the application for amendment because to allow the amendment would be inconsistent with the view expressed earlier by the court in that s. 8 of the Defamation Act cannot apply.

(c) Whether The Apology Is Within The Ambit Of s. 10(1) Of The Defamation Act

In relation to the reliance of making an apology in mitigation of damages pursuant to s. 10(1) of the Defamation Act by the defendants, it is undisputed that the plaintiffs commenced action on 20 January 2003 and the defendants published an apology on 29 March 2003 and filed a joint defence on 7 April 2003. It was conceded by the learned counsel for the plaintiff that the notice of intention to offer the apology was made by the defendants on 2 April 2003

but submitted that it is before the filing of the defence. The court will not consider the date of 31 December 2002 as such date was not deposed by the plaintiff in his affidavit and neither is it stated in the pleadings.

The learned counsel for the plaintiff submitted the apology does not come within the purview of s. 10(1) of the Defamation Act and ought not to be admitted. It was also submitted the defendants' purported apology if allowed to stand and be adduced will circumvent and will be contrary to the law which prohibits the admission of such evidence since the apology covered the charges not allowed in law to be adduced.

However the defendants contend otherwise basically on the ground that s. 10(1) of the Defamation Act is more of an evidential provision than a substantive one.

The issue to be determined is whether the apology falls within the ambit of s. 10(1) of the Defamation Act. Section 10(1) of the Defamation Act provides:

> In any action for defamation the defendant may (after notice in writing of his intention to do so duly given to the plaintiff at the time of filing his written statement of his case) give in evidence, in mitigation of damages, that he made or offered an apology to the plaintiff for such defamation before the commencement of such action or as soon afterwards as he had an opportunity of doing so in case the action shall have been commenced before there was an opportunity of making or offering such apology.

From a literal reading of the provision it is clear that in any action for defamation, the defendant may adduce evidence, in mitigation of damages that he made or offered an apology to the plaintiff concerned:

(i) before the commencement of the plaintiff's action for defamation; or

(ii) as soon afterwards as he had an opportunity of making or offering such apology,

provided that notice of intention to adduce such evidence is to be given at the time of filing of the defendant's written statement of his case. In the context of the present case, the question which remains is when can it be said that notice of such intention to the plaintiff has been duly given by the defendants?

Section 10(1) of the Defamation Act appears to be akin to s. 1 of the Libel Act 1843(commonly known as Lord Campell's Act 1843)('Lord Campell's Act"). The latter section stipulates "In every action for libel or slander the defendant can give evidence in mitigation of damages that he made or offered

an apology to the plaintiff before the commencement of the action, or so soon afterwards as he had an opportunity of making or offering such apology, provided that he gives notice in writing to the plaintiff of his intention to do so at the time of delivering his defence or incorporates the apology in the defence." (see footnote 89, p. 698, *Gatley on Libel and Slander* 9th edn.) Therefore, to draw a comparison of s. 10(1) with s. 1 would be helpful.

Under s. 1 of Lord Campell's Act it is unequivocal that the defendant can give the notice in writing of his intention to do so:

(i) at the time of delivering his defence; or

(ii) if he incorporates the apology in his defence.

It is observed that whilst these two qualifications in s. 1 of Lord Campell's Act is drafted by way of a proviso; in s. 10(1), only a provision similar to limb (i) is provided in s. 10(1) by way of a parenthesis. Be that as it may, in relation to limb (i) it is respectfully submitted that s. 10(1) is similar to s. 1 of Lord Campell's Act in that the "written statement of case" to be filed by the defendant should be construed as none other than a "defence". Thus it follows that the defendant can give notice in writing of his intention to offer an apology in mitigation of damages at the time of delivering his defence. However, what is not clear in s. 10(1) of the Defamation Act is whether the defendant can give notice of his intention by incorporating the apology in his defence as is expressly provided for in s. 1 of Lord Campell's Act.

Notwithstanding the absence of such explicit provision, I am of the opinion that the defendant would have complied with the statutory requirement of s. 10(1) if he incorporates his apology in his defence. In my view such an interpretation is tenable in the light of the authority of *Malayan Banking Bhd v. Lim Chee Leng & Anor* [1985] 1 MLJ 214. In this case, involving a trust receipt upon which the plaintiffs sued the four defendants who were partners of a firm for a sum of money, the plaintiffs alleged that they issued notice of demand but the defendants failed to pay. On appeal, the defendants cross-appealed against the summary judgment entered against them whilst the plaintiffs appealed against the refusal to grant them interest. The Federal Court upheld the decision of the learned judge in giving summary judgment but disagreed with the learned judge's finding that the plaintiffs had failed to serve the defendants the notice of demand for which the plaintiffs were denied the right of interest. In this context, the Federal Court held that the trust receipt matured and became payable/due on a certain date long before the 1st and 4th defendants resigned and before the 2nd defendant claimed he was no longer associated with the firm. Further, more importantly, it also held that no notice was necessary

as the writ itself is a notice, (see p. 215). Therefore, following the principle in *Lim Chee Leng (supra)*, I agree with the argument of learned counsel for the defendants on this point that pleadings can constitute notice, and all the more so when s. 10(1) of the Defamation Act does not prescribe the form of notice to be given other than stipulating that it must be in writing.

Having established that such is the interpretation to be accorded to s. 10(1) of the Defamation Act, I find that the defendants have duly complied with the statutory requirement under s. 10(1) by incorporating the apology in the statement of defence (para. 10) which constitutes notice in writing to be given to the plaintiff at the time of filing his written statement of case.

Further, in s. 10(1) of the Defamation Act, it is observed that the phrase "give in evidence" appears in the provision. In the context of the section it means that it is open to the defendant to adduce evidence that he made or offered an apology to the plaintiff in mitigation of damages. Therefore I am inclined to agree that the provision is more of an evidential provision than a substantive one. All the defendant needs to do to invoke this section as a defence is to ensure the defendant complies with the requirements prescribed under the section as has been discussed earlier.

In *Gatley on Libel and Slander*, 9th edn., para 31.2, pp. 789-790, it is stated, "The purpose of an apology is to appease the injured feelings of the person defamed and to undo the harm done to his reputation in consequence of the publication. The terms of the apology will depend upon the nature of the defamatory statement but it should invariably include "a full and frank withdrawal of the charges or suggestions conveyed. "The sufficiency of an apology is a matter for the jury to decide." In the light of this, I am of the view that the merits of whether the apology of the defendants is adequate or not has to be decided at a full trial and not by summary procedure.

Furthermore I respectfully disagree with the argument of the plaintiff because an apology constitutes a defence in mitigation of damages and is a different kettle of fish altogether from the defence of partial justification under s. 8 of the Defamation Act. Therefore, in my view, the arguments in support of s. 8 cannot apply in determining the issue under s. 10(1) where different legal considerations apply as has been shown.

As to the argument of the plaintiff that the apology was not a full apology, I find that it is a non-issue as the term "full apology" is used in the context of s. 10(2) of the Defamation Act which is not relied on by the parties.

In conclusion the court is mindful of the well settled principles enunciated in *Bandar Builders Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 that the court exercises its power of summary procedure under O. 18 r. 19(1) only in plain and obvious cases. For the reasons stated above, I find that it is plain and obvious that the defendants' pleadings in respect of paras. 5, 7 (4) and part of 7 (3) in so far as it related to para. 5 of the statement of defence ought to be struck out pursuant to O. 18 r. 19(1) of the RHC for being frivolous, an abuse of the process of the court and may embarrass or delay the fair trial of the action.

However, it does not apply to the whole of para. 10 of the statement of defence which I find is a triable issue and ought to be determined at a full trial. I find support in the case of *Goode v. Journal Publishing Co.* [1907] 6 WLR 511 (NWP). In this case by a motion by the plaintiff to strike out a portion of the statement of defence in an action for libel alleged to have been published in the defendants' newspaper on the ground, *inter alia*, that that portion of the defence discloses no legal ground of defence ie, it is embarrassing. It is to be noted that in that portion of the defence the defendant relies on s. 1 of Lord Campell's Act, 6 and 7 Vict. ch. 96 which authorises a defendant in any action for defamation (after notice in writing at the time of filing the defence) to give evidence in mitigation of damages that he has made or offered an apology to the plaintiff. The court refused to strike out as embarrassing an apology so incorporated (*Goode*'s case *(supra)*) was cited in footnote 89 at p. 698 of *Gatley on Libel and Slander*, 9th edn.).

For the aforesaid reasons, the court grants order in terms of paras. 1, 2 and 4 of the application. On the issue of costs, agreed costs of RM500 is to be paid forthwith to the plaintiff.